76-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ——

FRUEHAUF CORPORATION,
Petitioner,

vs.

TRUCK EQUIPMENT SERVICE COMPANY,
Respondent.

BRIEF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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STATEMENT OF THE CASE

A. Manner of Reference

In its brief, the respondent will refer to the parties and record in the following manner:

The Respondent, Truck Equipment Service Company:

"TESCO"

The Petitioner, Fruehauf Corporation:

"Fruehauf"

The Hobbs Division of Fruehauf:

"Hobbs"

The Transcript of Testimony in the Trial Court:

"(Tr, Vol. —, ——:——)"

Volume A contains the testimony received at the trials of December 19, 1972, (Liability) and June 1, 1973, (Injunction). Volumes I, II and III contain the testimony received at the trial of April, 1975, (Amount of Recovery).

The Exhibits received by the Trial Court:

"(Ex. ——:——)"

Plaintiff's exhibits will be identified "Pl" followed by the number, Defendant's "Df".

The pleadings and orders contained in the Designated Portion of the Trial Court Record, by identifying the pleading and the page of the Designated Record where found, e. g.:

"(Pretrial Order: 14)"

The testimony received by the Trial Court contained in depositions:

"(Dep. ————————, ——:——)"

The testimony of several witnesses is contained in two different depositions, for those witnesses, the date of the deposition will also be shown, e. g., (Dep. Biggers, 8/3/72, 5:12).

The orders and decisions of the Trial Court and the Eighth Circuit Court by reference to the Appendix in the Petition for a Writ of Certiorari.

B. Nature of the Case

TESCO's causes of action are based upon unlawful competition and trademark violation by Fruehauf in the sale of semi-truck trailers in interstate commerce.

TESCO alleges that Fruehauf copied both the functional and nonfunctional features of its unique twin hopper bottomed grain trailer, that the unique exterior appearance of its trailer constitutes a device used by it to identify its trailers and distinguish them from grain hopper trailers made by other manufacturers, and that the conduct of Fruehauf is actionable under Section 43(a) of the Lanham Act, Title 15, U. S. C. A., Section 1125(a).

C. Course of Proceedings

The parties jointly moved for an order bifurcating the issues of liability and damages (Joint Motion:12).

The issue of liability was submitted to the Trial Court on December 19, 1972 (Tr., Vol. A).

TESCO's request for an injunction was submitted to the Trial Court on June 1, 1973 (Tr., Vol. A).

Fruehauf resisted TESCO's discovery efforts to obtain financial data showing profits from the sale of the unlawfully copied hopper trailers. The right of TESCO to an accounting was submitted to the Trial Court for determination on Fruehauf's Motion for Protective Order.

The issue of the amount of TESCO's recovery from Fruehauf was submitted to the Trial Court in April, 1975, (Tr., Vols. I, II, III).

D. Deposition in the Courts Below

The Trial Court rendered four orders resolving the issues:

Memorandum on Liability, April 20, 1973.

The Trial Court held that Fruehauf was liable to TESCO ". . . for engaging in unfair competition by using the photograph of the plaintiff's product on its advertising literature and for copying the distinctive design of the plaintiff's hopper bottomed trailer." (A-1).

Injunction, June 14, 1973.

The trial Court enjoined Fruehauf from "any further acts of manufacturing, selling or delivering any twin hopper bottomed grain or bulk commodity semi-trailers in (thirteen identified states) which semi-trailers have an exterior appearance the same as or deceptively similar to the exterior appearance of the Cornhusker 800 twin hopper bottomed grain or bulk commodity semi-trailer manufactured" by TESCO (A-12, 15).

Duty to Account for Profits, October 10, 1973.

In requiring Fruehauf to provide financial data showing profits from the sale of the unlawfully copied hopper trailers, the Trial Court found:

> "In the present case the evidence shows that (Fruehauf) deliberately copied the distinctive design of (TESCO's) hopper bottomed trailer, and it cannot be said that (Fruehauf) believed that no likelihood of confusion as to the source of origin of the trailer would occur in the marketplace. (Fruehauf) chose to copy the most distinctively designed hopper trailer sold in the marketplace in an attempt to divert sales

> from other competitors who manufactured a less identifiable product. (*Fruehauf*) *deliberately fed upon the identification factors which were intentionally designed into the Cornhusker 800 trailer by (TESCO's) president. Wilfulness and bad faith are clearly shown by the evidence.* (Emphasis supplied.)
>
> • • •
>
> ". . . I conclude that (TESCO) may recover actual damages sustained as a result of pecuniary loss to its business and such portion as equity requires of (Fruehauf's) profits on sales of hopper bottomed trailers which were identical in appearance to those manufactured by (TESCO), but there must be no double recovery.
>
> • • •
>
> "An accounting of (Fruehauf's) profits will be required." (A-17).

Amount of Recovery, April 28, 1975

At the April, 1975, trial, Fruehauf offered evidence that its profits from the sale of the unlawfully copied trailers in the thirteen identified states was $438,204 (Ex., Df:102). The Trial Court limited TESCO's recovery to

(a) Twenty per cent of Fruehauf's profits from sales in only the states of Nebraska, Iowa and Minnesota	$27,580.12
(b) A limited amount of Fruehauf's profits from the sale of trade-ins in the three states.	789.91
(c) Nominal damages	1.00
(d) Out-of-pocket expenses, excluding attorney fees	2,699.18
Total	$31,070.21

In addition, the Trial Court removed the injunction prohibiting Fruehauf from manufacturing and selling exact copies of TESCO's Cornhusker 800 hopper trailer (A-23, 30).

Eighth Circuit Court Appeal, June 9, 1976

TESCO appealed to the Eighth Circuit Court. Fruehauf cross-appealed.

On June 9, 1976, the Court of Appeals rendered its decision. The Court discussed in detail and rejected the arguments of Fruehauf that it is privileged to copy the exterior design of TESCO's Cornhusker 800. The Court went on to properly apply the law and held:

> " . . . (T)he judgment and order of the District Court is affirmed except as to the recovery of profits. As to that, the cause is remanded for entry of judgment in that amount which will award TESCO all of Fruehauf's profits from sales of the trailers copied from the Cornhusker 800 and trade-ins taken as part of the purchase price in the sale of those trailers in Nebraska, Iowa and Minnesota during the period of infringement." (A-30, 54).

The mandate has issued and the Trial Court has entered judgment for TESCO in the amount of $144,550.41.

E. Statement of Facts

Prior to the trial on the issue of liability, the parties submitted to the Trial Court, and the Trial Court adopted an Order on Pretrial Conference which sets forth "Uncontroverted Facts" as follows:

> "2. *Uncontroverted Facts*: The parties have agreed that the following may be accepted as established facts for the purposes of this case only:
>
> (a) Truck Equipment Service Company is the original manufacturer of a twin hopper bottomed grain or bulk commodity semi-trailer featuring a twin hopper design and structure.

(b) Truck Equipment Service Company has been selling its hopper bottomed trailer under the label 'Cornhusker 800' in interstate commerce since 1968.

(c) In August, 1970, Fruehauf Corporation, through its Hobbs Division purchased a Cornhusker 800 from Truck Equipment Service Company.

(d) Upon delivery of the Cornhusker 800 in October, 1970, Fruehauf removed three labels which stated 'Cornhusker 800, Mfd. by Truck Equipment Service Company, Lincoln, Nebraska,' and substituted labels stating 'Hobbs.'

(e) In October, 1970, the Cornhusker 800 bearing Hobbs' labels was photographed by Fruehauf and the photographs were used on sales literature, distributed in interstate commerce to its sales personnel for use in the sale of a twin hopper bottomed grain trailer manufactured by Fruehauf. The hopper design and structure is substantially similar and the exterior appearance of the Fruehauf trailer is almost identical to and was copied from the Cornhusker 800.

(f) In December, 1970, the Cornhusker 800 bearing Hobbs' labels was photographed by Fruehauf and the photographs were used by Fruehauf on sales literature, distributed in interstate commerce, to sell a twin hopper bottomed grain trailer manufactured by Fruehauf. The hopper design and structure is substantially similar and the exterior appearance of the Fruehauf trailer is almost identical to and was copied from the Cornhusker 800.

(g) Since 1970, Fruehauf has sold in interstate commerce a hopper bottomed grain trailer under both the Hobbs and Fruehauf labels, the exterior appearance of which is almost identical to and was copied from the Cornhusker 800."

(Order on Pretrial Conference: 14)

The Order set forth the "Controverted and Unresolved Issues" as follows:

> "3. *Controverted and Unresolved Issues*: The issues remaining to be determined and unresolved matters for the Court's attention are:
>
> The unresolved issue is whether the facts and applicable law prohibit Fruehauf from copying the innovative hopper design and structure of the Cornhusker 800 and its distinctive exterior appearance.
>
> Primary to this determination is the issue of whether the unique and distinctive exterior appearance of the Cornhusker 800 is a trademark used by Truck Equipment Service Company to identify and distinguish its hopper bottomed trailer from those manufactured by others, and if so, if the action of Fruehauf in marketing a hopper bottomed trailer with identical exterior appearance copied from the Cornhusker 800, including the use of photographs of the Cornhusker 800 to aid in the sale of Fruehauf copies, is actionable.
>
> Evidence will be required to support the positions of the litigants with reference to controverted issues."

(Order on Pretrial Conference: 14)

As stated, the TESCO twin hopper bottomed grain trailer was sold under the name "Cornhusker 800," and hereinafter it shall be so designated. The copies of the Cornhusker 800 sold by Fruehauf under both the Fruehauf and Hobbs labels were identified as Model "HO-7101-39' Hopper Grain Trailer." All copies were manufactured by Fruehauf's Hobbs Division. Hereinafter all copies will be referred to as "the Hobbs copies" unless the context requires further identification of the Fruehauf division marketing the trailers.

Prior to the trial of April 1975, there was no effort by Fruehauf to do anything but agree that the exterior appearance of the Cornhusker 800 was unique and nonfunctional, used by TESCO as a device to identify its trailer and distinguish it from grain hopper trailers made by other manufacturers.

Mr. Biggers, vice president of Fruehauf and general manager of Hobbs:

> **"Q. Returning then to Exhibit 5 and directing your attention to both the front and the rear of that side view of the trailer, do you know, Mr. Biggers, whether, for example, the sloped nose of the trailer and rear of the trailer serves a functional purpose in the trailer?**
>
> **A. No, I don't know.**
>
> **Q. Did you get a report from Mr. Pappas or any other person concerning whether this was functional or simply style?**
>
> **A. No. I don't recall it ever being discussed.**
>
> **Q. Do you know whether or not the design of the sides of the trailer, as shown on the drawing, Exhibit 5, which shows the sides of the trailer in the area of the hoppers to be parallel to the ground, straight across the bottom, is one that serves a functional purpose in the design of the trailer?**
>
> **A. No. I wouldn't think so. You could go either way and I think we have gone both ways with it."**

(Dep. Biggers, 8/3/72, 45:21-46:11)

Mr. Doyle, vice president—sales of Hobbs:

> **"Q. In your area of concern for the sale of the hopper bottom trailer, did you make any determina-**

tion of what parts of the Cornhusker 800 trailer which was copied were style as opposed to functional?

A. No.

Q. Were you aware in your sales efforts that the Hobbs trailer was nearly identical in appearance to the Cornhusker 800 trailer?

A. Yes."

(Dep. Doyle, 35:10-18)

Mr. Pappas, chief engineer of Hobbs:

"Q. In your inspection of the Cornhusker 800 trailer at the Cleburne, Texas, plant and those that you inspected in the Omaha area, did you make any effort to determine what, if any, portions of the Cornhusker 800 design were functional as opposed to style?

A. No."

(Dep. Pappas, 14:19-24)

The most compelling evidence in the Trial Court record that the exterior appearance of the Cornhusker 800 is nonfunctional is the report of the engineers in Fruehauf's research and development section in Detroit. The report made in February, 1971, immediately after Fruehauf began manufacture of the Hobbs copies states in part:

> "Before loading subject grain haul several test personnel inspected the trailer for design or quality flaws. The attached comments are pretest inspection results. Pretest inspection was made by A. Aiello P. DeVergilio, R. Kuczera, E. Simon, and R. Harris. The comments have not been edited only duplicate comments have been omitted.
>
> INSPECTION OF HOBBS HOPPER GRAIN HAUL MODEL NUMBER: HO 7101-39, SERIAL NUMBER: CIN 7892-02

1. . . .

6. The entire side skin of the rear of the trailer from the transition area back is useless. The way it is set up its only function will be to gather road dirt and mud. Either:

   a. Redesign the aft end with an appearance of one of Fruehauf's bulk trailers or

   b. Hinge the rear of the trailer, provide a back door and a floor as an additional selling point to haul limited packaged material instead of dead heading or

   c. Make the empty space a provision for spare tire and tarp storage.

. . .

21. See item 6—everything said about the rear is directly applicable to the front."

(Ex. Pl:28)

At the April, 1975, trial Fruehauf attempted to disavow the report through the testimony of Mr. Pappas. However, Mr. Pappas agreed that the Hobbs copies of the Cornhusker 800 could have been made to look like the artist's drawings of a twin hopper trailer with the side skin removed as recommended in the engineer's report, and the trailer would have functioned the same (Ex. Pl: 49 & 50) (Tr. Vol. III, 513:14-514:15; 548:4-553:9; 562:21-563:24).

The exterior appearance of the Cornhusker 800 is both unique and nonfunctional, an identifying trademark used by TESCO for its twin hopper grain trailer.

No other hopper bottomed grain trailer sold has an appearance similar to the Cornhusker 800. Mr. Jesperson, the Hobbs employee who recommended copying the

Cornhusker 800, identified the hopper trailers sold by others (Dep. Jesperson, 57:11). The sales literature of the other manufacturers was received in evidence (Ex. Pl. 8-14). None has an exterior appearance similar to the Cornhusker 800 including the other hopper trailer manufactured by Fruehauf (Ex. Pl:14).

In its sales bulletin introducing the Hobbs copies, released November 23, 1970, prior to the commencement of manufacture by Fruehauf, and which included pictures of the Cornhusker 800 with Hobbs labels, Fruehauf states:

> "This trailer has been road tested in the field for the past three years and has been investigated by our engineering staff and myself. It is not a warmed over grain trailer. . . .
>
> • • •
>
> "The center drop services the main concentrated portion of the trailer giving additional wall height and strength. *This feature also gives the truck its own identification.*" (Emphasis supplied.) (Ex. Pl:20).

The decision to build the Hobbs copies with an exterior appearance exactly like the Cornhusker 800 was a "sales" decision, not an "engineering" one.

Mr. Jesperson's testimony:

> "Q. What convinced him, then, to go ahead and build a t r a i l e r which was identical in style to the Cornhusker?
>
> A. Because the decision of what to build is up to management, not engineering."
>
> (Dep. Jesperson, 65:4-7)

Mr. Doyle stated that the Fruehauf's engineering report stating that this exterior appearance of the Hobbs

copies should be changed (Ex. Pl:28) was "ignored." (Tr. Vol. II, 250:10-11). Mr. Doyle clearly stated that the reason for maintaining the exact copy of the exterior of the Cornhusker 800 was to trade upon its market acceptance.

> "Q. The reports in sum told you that the reputation of the Cornhusker 800 was a good trailer?
>
> A. Yes.
>
> Q. And that was part of your motivation in copying it?
>
> A. That was the sole motivation."
>
> (Tr. Vol. II, 255:11-15)
>
> Q. And I take it in making that decision it was a sales oriented decision, 'Can we sell enough to justify our investment in the production?'
>
> A. Exactly.
>
> • • •
>
> Q. And I believe both you and Mr. Biggers testified in your depositions that you made no effort to distinguish between the functional and non-functional features of the Cornhusker?
>
> A. I did not."
>
> (Tr. Vol. II, 256:9-20)

Even though Fruehauf is the nation's largest manufacturer of semi-truck trailers with annual sales of nearly three-quarters of a billion dollars, prior to marketing the Hobbs copies it sold a minimal number of grain trailers. In 1970, it sold twenty-six grain trailers (Dep. Biggers, 8/3/72, 14:10-13).

The primary market area for grain trailers is the grain-producing and cattle-feeding states (Dep. Doyle, 23:

9-25, 24:1-3). The sales of the Cornhusker 800 (Ex. Pl: 4 & 46) and the Hobbs copies (Ex. Pl:39 & 40) were principally in the states of Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Illinois, Missouri, Kansas, Oklahoma, Colorado, Wyoming, Texas, and Wisconsin. These thirteen states were identified in the Trial Court's injunction, and the states in which sales and profits were accounted for.

In the twenty-nine months Fruehauf sold the Hobbs copies until enjoined by the Court, it sold four hundred eighty-nine copies in the thirteen identified states (Ex. Df:102).

The "Uncontroverted Facts" in the Order on Pretrial Conference—Amount of Recovery Issues—are as follows:

"2. *Uncontroverted Facts.* The parties have agreed that the following may be accepted as established facts for the purpose of this case only:

(a) Fruehauf has submitted reports for sales costs and profits resulting from the sale of 477 hopper bottomed grain trailers which were identical in exterior appearance to the Cornhusker 800 and which were sold from January, 1971, until enjoined by the Court. The sales were made in the states covered by the Court's injunction of June 14, 1973.

(b) The total sales for the 477 copied trailers was $3,926,086.00. After deducting costs and expenses, Fruehauf reported a profit on these sales of $420,149.87.

(c) In addition to the new trailer sales, Fruehauf reported information on the sale of 59 trade-ins which were received and sold on the new trailer transactions. Fruehauf's profit on the trade-in transactions was $7,190.55.

(d) During the period of the unlawful competition, the Fruehauf Corporation, through its Hobbs Division, manufactured and sold 546 of the copied trailers. The Hobbs Division herein accounted for the sale of 363 of the trailers, the Fruehauf Division accounted for 114 of the trailers.

(e) 386 of the copied trailers were sold under the 'Hobbs' label. 160 were sold under the 'Fruehauf' label."

(Order on Pretrail Conference:46)

Throughout the course of the litigation, Fruehauf supplied varying financial data concerning the sales and profits for the Hobbs copies in the thirteen identified states (Ex. Pl:38, 39 & 40). At the April, 1975, trial, Fruehauf made its final revisions and reported a profit of $438,204 on the sale of 489 Hobbs copies in the thirteen identified states (Ex. Df:102). In addition, Fruehauf had profits on trade-ins of at least $7,190 (Ex. Pl. 42).

The total profits obtained by Fruehauf through the sale of the Hobbs copies in the thirteen identified states was at least $445,394.

———o———

SUMMARY OF ARGUMENT

The Courts below properly concluded that the exterior appearance of the Cornhusker 800 was nonfunctional and that its unique design indicated the origin of the trailer, and thus it was unlawful for Fruehauf to copy this distinctive, identifying trademark of the Cornhusker 800; that Fruehauf's actions of copying the exterior of the Corn-

husker 800 constituted a deceptive and misleading practice proscribed by the Lanham Act; that Fruehauf's action was willful and in bad faith, done to divert sales and unlawfully compete with TESCO; and that equity required an accounting of Fruehauf's profits.

The Eighth Circuit Court properly determined that Fruehauf must pay over to TESCO all of its profits from the sale of the copies in three states, Nebraska, Iowa and Minnesota, because of Fruehauf's unlawful, bad faith conduct, and "to ensure that similar conduct will not reoccur in the future." (A53).

In making its determinations, the Eighth Circuit Court followed prior decisions of this Court and other Circuits. There are no special and important reasons, as required by Rule 19, for granting the Petition for a Writ of Certiorari.

———o———

ARGUMENT

I.

The unique, nonfunctional exterior appearance of TESCO's Cornhusker 800 which distinguishes it from hopper bottomed trailers sold by other manufacturers is a trademark.

The Courts below properly determined that the unique, nonfunctional exterior appearance of the Cornhusker 800 was a device adopted and used by TESCO to identify its hopper bottomed trailer and distinguish it from hopper bottomed trailers manufactured by others.

There can be no question that the exterior appearance of the Cornhusker 800 is unique and distinctive. The exterior appearance of the hopper bottomed trailers manufactured by others is shown in their sales brochures (Ex. P1:8-14). These exhibits quickly and conclusively demonstrate that the exterior of the Cornhusker 800 is unlike that of any other sold in the marketplace.

Some of these manufacturers who make and sell hopper bottomed trailers have much larger sales than does TESCO, but none of them sells a hopper bottomed trailer that has the unique, distinctive appearance of the Cornhusker 800.

The Trial Court's findings include the following:

> "The defendant deliberately fed upon the identification factors which were intentionally designed into the Cornhusker 800 trailer by the plaintiff's president." A-21)

As the device adopted and used by TESCO to identify and distinguish its hopper bottomed trailer, the exterior appearance of the Cornhusker 800 became a trademark as defined by the Lanham Act (Title 15, U. S. C. A., Section 1127).

TESCO does not seek a remedy because Fruehauf copied the functional features of the Cornhusker 800 which are also unique. The law does not grant such a remedy:

> An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so."
>
> *Sears, Roebuck and Co. v. Stiffel Company,* 375 U. S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964).

There is no question that the functional features of the Cornhusker 800 make it acceptable to and desired by the truckers who buy hopper grain trailers. No one argues the fact that the Cornhusker 800 is an excellent hopper grain trailer.

Mr. Doyle, Hobbs' vice president—sales, when asked about the reputation of TESCO's Cornhusker 800, replied:

> "That they obviously built one of the finest grain trailers on the road and that it was giving no appreciable amount of trouble." (Tr. Vol. II, 254:21-23)

What TESCO seeks redress for is Fruehauf's copying the unique, nonfunctional exterior appearance used by TESCO to identify its quality hopper grain trailer. No one can seriously contend to the contrary that Fruehauf could have built a hopper grain trailer copying the excellent functional features of the Cornhusker 800 *without* copying the unique, nonfunctional exterior appearance. Fruehauf's research and development engineers recommended at the beginning of manufacture, before any complaint by TESCO, that the exterior appearance be redesigned (Ex. Pl:28).

Even Mr. Pappas, who Fruehauf had testify at length during the April, 1975, trial in an effort to reduce the credibility of the engineer's report, agreed that Fruehauf could have copied the functional features of the Cornhusker 800 and had an exterior appearance like the artist's drawings of what the trailer would look like if the engineer's recommendations were followed (Ex. Pl:49 & 50) (Tr. Vol. III, 562:21-563:24). In addition, the credibility of Mr. Pappas' testimony that the Hobbs copy could not have been built any other way is highly suspect in light

of his previous testimony that he made no effort to determine what parts of the Cornhusker 800 were functional and nonfunctional, and further that as a result of the Fruehauf engineer's report he made some structural changes but none of the recommended appearance changes were made (Dep. Pappas, 14:19-24; 15:19-16:5). Pappas also testified in the Trial Court on December 19, 1972, and offered none of the theories he presented to the Trial Court during the April, 1975, trial (Tr. Vol. A, 55:7-62:2).

Mr. Jesperson also agreed that the Hobbs copy could have had the functional features of the Cornhusker 800 without appearing exactly the same, stating that the Hobbs copies could have looked like the Fruehauf engineer's report recommended:

> "A. . . . You could leave it (the sloping end walls) open . . ."
>
> (Tr. Vol. I, 135:17)
>
> "Okay. Now you could connect the cross members between the two side walls and not cover that area with skin?
>
> A. There have been trailers that do it.
>
> Q. And you could have built a Hobbs that way?
>
> A. Yes, we could have."
>
> (Tr. Vol. I, 199:1-6)

The Ninth Circuit Court in *Bliss v. Gotham Industries, Inc.*, 316 F. 2d 848 (9th Cir. 1963), stated the applicable rule as follows:

> "Again assuming the similarity of the pitchers that appellees copied, the principles enunciated by Judge Orr in Pagliero v. Wallace China Co., 9 Cir., 198 F. 2d 339, 343, applies here . . .'Imitation of the physi-

cal details and design of a competitor's product may be actionable, if the particular features imitated are "nonfunctional" and have acquired a secondary meaning. Crescent Tool Co. v. Kilborn and Bishop Co., 2 Cir. 1917, 247 F. 299. * * * On the other hand, *where the feature or more aptly, design, is a mere arbitrary, embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where requisite showing of secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection.'"* (Emphasis supplied.)

The market penetration of the Cornhusker 800 is then a relevant consideration in the determination of the scope of protection to which TESCO is entitled. In *Sweetarts v. Sunline, Inc.*, 436 F. 2d 705 (8th Cir. 1971), it is stated:

"Though the market penetration need not be large to entitle plaintiff to protection, Sweet Sixteen Co. v. Sweet '16' Shop, 15 F. 2d 920, 8 Cir., 1926, it must be significant enough to pose a real likelihood of confusion among consumers in that area between products of the plaintiff and products of the defendant."

The Court in *Sweetarts* quoted from *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 36 S. Ct. 357, 60 L. Ed. 713 (1945):

"Into whatever markets the use of a trade mark has extended or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trademark, good in the markets where it has been employed, can monopolize markets that his trade has never reached, and where the mark signifies not his goods, but those of another * * *. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

The relevant issue is into what markets has the Cornhusker 800 extended and its meaning become known.

In considering market penetration, the Eighth Circuit Court determined that the Cornhusker 800 had attained market penetration, acceptance, and identification in the states of Nebraska, Iowa, and Minnesota.

The Eighth Circuit Court has stated the rule of secondary meaning in the marketplace in *Shoppers Fair of Arkansas, Inc. v. Sanders Co.*, 328 F. 2d 496 (8th Cir. 1964):

"We believe that the case of Liberty Mutual Ins. Co. v. Liberty Insurance Co. of Texas, 185 F. Supp. 895, 903 (E. D. Ark. 1960) succinctly states what is necessary to establish a secondary meaning:

"'However, a name, mark or symbol by long and exclusive use and advertising by one person in the sale of his goods and services may become so associated in the public mind with such goods or services that it serves to identify them and distinguish them from the goods or services of others. When such an association exists, the name, mark or symbol is said to have acquired a "secondary meaning," in which the original user has a property right which equity will protect against unfair appropriation by a competitor.'"

That the exterior appearance of the Cornhusker 800 is unique, distinctive and thus identifying is conclusively established in the Trial Court record. There can be no doubt that this unique appearance is associated with the hopper bottomed trailer built by TESCO in the mind of the trailer-buying public.

The Cornhusker 800's trademark is its unique exterior appearance. It has traveled to and in the marketplace throughout middle America. The point of sale of the product in no way limits its identification and recognition because of the manner in which the product is used.

The conclusion that the unique exterior appearance of the Cornhusker 800 has a secondary meaning—identifying the Cornhusker 800—throughout middle America is supported by the record.

The intent of Fruehauf to trade upon the customer acceptance of the Cornhusker 800 by offering a hopper grain trailer that looked exactly like it is well demonstrated by Fruehauf's method of entry into the market. It purchased a Cornhusker 800, replaced the TESCO labels with its own, photographed the trailer, and used the photo with its sales bulletin introducing a hopper trailer "road tested in the field for the past three years," (failing to mention that the "tests" were of Cornhusker 800's by TESCO and its customers). Two months later, it photographed the Cornhusker 800 with Hobbs label *again* and used these photos on widely distributed sales literature; the only sales piece used by Fruehauf for the next seven months.

Mr. Doyle, the highest officer offered by Fruehauf at the April, 1975, trial, candidly acknowledged that Fruehauf had acted in an "irresponsible manner."

> "No, we didn't give any thought to any impropriety involved in copying the Cornhusker trailer. I have given a lot of thought about the irresponsible manner and carelessness in these photographs and particularly in this letter (Ex. Pl:20) failing to point out

> that we were going to build it—in the letter of November 21, as I recall it."
>
> (Tr. Vol. II, 236:16-21)

• • •

> "Yes. I think it was highly irresponsible of us for not clarifying the point tnat the pictures attached depicted a trailer very similar to what we were going to manufacture." (Tr. Vol. II, 265:23-25)

The record is ringingly clear—Fruehauf knowingly and willfully photographed and then copied the unique, non-functional exterior appearance of the Cornhusker 800, TESCO's trademark for its hopper bottomed grain trailer, for one purpose only, to trade upon the known market acceptance of the Cornhusker 800, all in violation of TESCO's rights.

As stated in *Audio-Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F. 2d 551 (9th Cir. 1960), the willful act of precisely copying the exterior of the Cornhusker 800 shifts the burden to Fruehauf to show that there was no secondary meaning:

> "But the trial court, having become convinced that exact copying by appellee of appellant's design had taken place, applied an improper theory of law in failing to rely on the inference created by such proof of copying. That proof without any opposing proof, is sufficient to establish a secondary meaning to the jacket. *There is no logical reason for the precise copying save an attempt to realize upon a secondary meaning that is in existence.* National Van Lines v. Dean, supra. '"(A) late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile."' National Lead Co. v. Wolfe, supra, 223 F.

2d at page 202, quoting My-T Fine Corporation v. Samuels, 2 Cir. 1934, 69 F. 2d 76, 77." (Emphasis supplied.)

It is to be remembered that Fruehauf continued with the exact copy of the Cornhusker 800 notwithstanding the engineer's report that it be changed. The decision was a "sales" decision. To paraphrase—there is no logical reason for the precise copying save an attempt to realize upon this secondary meaning that was in existence!

In this matter, as in *W. E. Bassett Co. v. Revlon, Inc.*, 435 F. 2d 656 (2d Cir. 1970), the giant, as the latecomer to the marketplace, argues that it was factors other than trademark violation which caused it to sell the product. The *Bassett* court stated:

"Finally, Revlon's reliance on the fact that it uses its well-known name along with 'Cuti-Trim' is misplaced. As Judge Frankel stated, this tactic could well show that Revlon was seeking—as it evidently did when it undertook to buy Bassett's business—to couple the benefits of the 'Trim' mark with the persuasive powers of its own name, and thus the tactic could not insure against, but might instead promote confusion."

• • •

"The argument that Revlon's use of its well publicized name along with 'Cuti-Trim' indicates a lack of deliberate fraud is specious, for, if accepted, it would allow any company, that is well enough known, to infringe a competing company's mark, especially if the competitor is small, merely by coupling its own name with the competitor's mark."

It is not necessary that TESCO prove confusion in the marketplace.

"There was no proof of confusion in Sherman, and such proof is not a prerequisite, Sweetarts v. Sunline, Inc., 380 F. 2d 923, 927, (8th Cir. 1967), *but it is the likelihood of confusion which establishes infringement.*" (Emphasis supplied.)

Electronic Com'ns., Inc. v. Electronic Components For Ind. Co., 443 F. 2d 487 (8th Cir. 1971).

In *Electronic* the Court went on to state:

"In Sweetarts v. Sunline, Inc., 436 F. 2d 705 (8th Cir. 1971), we recognized that the issue of likelihood of confusion in a trademark infringement case is one of fact for resolution by the trial court, citing Shoppers Fair of Arkansas, Inc. v. Saunders Co., 328 F. 2d 496 (8th Cir. 1964). As we have hereto pointed out, such factual findings will not be set aside by a reviewing court unless clearly erroneous."

The findings of the Trial Court herein on April 20, 1973, were:

"The defendant's actions were deceptive and misleading, in that they tended to confuse the public about the origin of the hopper trailer. Moreover, the defendant copied the distinctive design of the plaintiff's trailer in order to trade upon the customer acceptance of the design, which had acquired a secondary association with the plaintiff." (A-10)

That finding was accepted and approved by the Eighth Circuit Court. It is supported by substantial evidence, particularly the testimony of Messers. Biggers, Doyle and Jesperson concerning why Fruehauf copied the exterior of the Cornhusker 800. It is underscored by the market survey (Ex. Df:70-72) which shows that a substantial majority of the purchasers of the Hobbs copies had seen the Cornhusker 800 prior to purchase.

The unique exterior appearance of the Cornhusker 800 is truly its trademark, the distinctive configuration into which TESCO has placed its hopper bottomed trailer.

The unique, nonfunctional exterior appearance of the Cornhusker 800 is TESCO's trademark, which distinguishes its hopper bottomed trailer from those of other manufacturers. The Cornhusker 800 has fully penetrated the mark for hopper bottomed trailers in middle America, and TESCO is entitled to relief for Fruehauf's unlawful use of its trademark.

II.

The right of TESCO to redress under the Lanham Act for the unlawful competition and trademark violation by Fruehauf.

Congress has enacted the Lanham Act to regulate unfair competition and the misuse of trademarks in interstate commerce.

In Title 15, U. S. C. A., Section 1127, the following definitions are prescribed:

> "The term 'trade-mark' includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.
>
> "The term 'mark' includes any trade-mark, service mark, collective mark, or certification mark entitled to registration under this chapter whether registered or not."

Under the Code, the unique, nonfunctional exterior appearance of the Cornhusker 800, used by TESCO to

identify its hopper trailer and distinguish it from hopper trailers sold by other manufacturers is a "trademark" and "mark" as those terms are used therein.

The intent of Congress is clearly set forth in Section 1127.

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations."

Congress has given owners of trademarks, registered or unregistered, a civil remedy against those who violate the rights of the trademark holder and unfairly compete. In addition to the language of Section 1127 "making actionable the deceptive and misleading use of marks in such commerce and protecting persons engaged in such commerce against unfair competition," Section 1125 identifies a private civil remedy:

> "(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the fal-

sity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Section 1117 of the Lanham Act identifies the remedies available for plaintiffs whose trademarks have been violated.

> "When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty."

While Section 1117 speaks initially about the rights of holders of registered marks, it also sets forth the elements

of recovery to be applied by the Court under the principles of equity.

The intent of Congress is to protect the holders of all trademarks, registered and unregistered, and to protect persons engaged in commerce against unfair competition (Section 1127).

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), the Supreme Court stated:

> ". . . in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. It provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances."

TESCO's trademark for the Cornhusker 800, its unique, nonfunctional exterior appearance is a "valid trademark" which has been infringed upon by Fruehauf. Validity of a trademark is not dependent upon registration.

It has been consistently held that the ownership rights in a trademark do not arise from registration. *Walgreen Drug Stores, Inc. v. Obear-Nester Glass Co.*, 113 F. 2d 956 (8th Cir. 1940), it is stated:

> "Mere registration under the Federal Act does not create a trademark and confers no new rights to the mark claimed, nor, indeed, any greater rights than already existed at common law without registration . . . registration is a method of recording for the protection of dealers, the public, and owners of trademarks. It is notice of the claims of the owner effect-

ing his right to the mark. But the right to such a trademark must have accrued from actual use, because such right is not created by registration of the mark. A trademark is inseparable from the goodwill of the business of its possessor and it exists only as an incident to the business in which it was lawfully acquired and with which it remains identified.

• • •

"The law of trademarks is a branch of the law of unfair competition, . . . and a trademark is infringed if such trademark, or a colorable imitation of it, is without authority placed upon substituted goods of the same class as those for which the mark has been appropriated. It would be a fraud for a producer or trader to use the trademark of another, and thus pass off his goods as the goods of the proprietor of the trademark."

The Third Circuit in *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F. 2d 649 (3rd Cir. 1954), held that Section 43 (a) of the Lanham Act (Section 1125 (a)) created a new substantive federal right of action for unfair competition. Section 1117 sets forth the elements of recovery for trademark violation based upon the Lanham Act. Following acceptance of the *L'Aiglon* doctrine, the federal substantive rights of owners of both registered and unregistered trademarks became co-extensive.

In *Parkway Baking Co. v. Friehofer Baking Co.*, 255 F. 2d 641 (3rd Cir. 1958), it is said:

> "In Section 43 (a) Congress has provided a remedy by way of civil damages or injunction against anyone who, in connection with goods or services in commerce uses a false designation of origin or false description or representation. 1 Callmann, Unfair Competition and Trade-Marks, Section 18.2 (b), L'Aiglon Apparel v. Lana Lobell, Inc., 3 Cir., 1954, 214 F. 2d 649. . . ."

In discussing the substantive rights created by the Lanham Act, the Court in *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F. 2d 405 (6th Cir. 1963) said:

> ". . . it (the Lanham Act) does provide a right of action to persons engaged in interstate and foreign commerce against deceptive and misleading use of common law trademarks and against deceptive and misleading use of words, names, symbols or devices, or any combination thereof, which have been adopted by a manufacturer or merchant to identify his goods and distinguish them from those manufactured by others, where such misleading use is carried on, in the channels of interstate and foreign commerce, which is subject to regulation by Congress."

In applying the provisions of the Lanham Act, the Eighth Circuit Court had in mind the broad remedial purposes of the Act as declared by Congress:

> "One is to protect the public so that it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trademark has spent energy, time and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats." S. Rep. No. 1333, 79th Conf. 2d Sess. 1-2 (1946), in U. S. Code. Cong. Serv. 1274 (1946).

III.

The power of Congress to regulate unfair competition in interstate commerce.

The principal argument of Fruehauf is that since TESCO does not have a patent on any part of its Cornhusker 800 twin hopper bottomed trailer, it can be copied, in every detail, with impunity.

Fruehauf argues further that if the Lanham Act is construed and applied as it was by the Eighth Circuit Court, it is unconstitutional; in violation of Article I, Section 8, Clause 8, which authorizes Congress to enact legislation relating to patent protection for inventions.

Fruehauf cites the companion cases, *Sears, Roebuck & Co. v. Stiffel,* 376 U.S. 225, 11 L. Ed. 2d 661, 84 S. Ct. 784 (1964) and *Compco v. Day-Brite Lighting, Inc.,* 376 U. S. 234, 11 L. Ed. 2d 669, 84 S. Ct. 779 (1964), for its proposition that since TESCO lacks a patent on any part of its Cornhusker 800, it can be copied.

In its *Sears* and *Compco* opinions, the Supreme Court discussed in some detail the ability of a *state* to enact legislation aimed at controlling unfair competition which might conflict with patent law, an area for exclusive federal control. The Supreme Court did not hold that a state could not enact effective legislation against unfair competition. The lower court decisions were reversed on the basis that they gave " . . . the equivalent of a patent monopoly on (an) unpatented" product.

The Lanham Act is of course not state legislation, but it is a federal enactment to proscribe unfair competition in interstate commerce.

To have any support for its theory, Fruehauf closes its eyes to the *fact,* unquestionable from the record, that the exterior appearance of the Cornhusker 800 is non-functional, intentionally designed by TESCO to identify its twin hopper bottomed trailer, and distinguish it from those made and sold by other manufacturers. TESCO has never sought to prevent Fruehauf from copying the functional, utilitarian features of its Cornhusker 800.

Cornhusker 800, like the twin hopper bottomed trailers sold by others, is purchased by truckers to haul grain and other bulk commodities. The reason the hopper bottomed trailer is preferred is because it unloads faster than level floor trailers. The funnel effect of the hoppers is a feature of every manufacturer's hopper bottomed trailer. Fruehauf argues that the hopper trailer could not have been built any other way, a strange statement in light of the fact that every other manufacturer's hopper bottomed trailer looks different than the Cornhusker 800 (Ex. Pl:8-14); Fruehauf's principal engineers, in research and development in Detroit said the Fruehauf copy should look differently (Ex. Pl:28); the new twin hopper designed by Mr. Pappas looks differently (Ex. Pl:54); and Mr. Pappas agreed he could have copied everyone of the Cornhusker 800 functional features and had the Fruehauf copy appear externally like the artist's drawings (Ex. Pl:49 & 50) which depict the way Fruehauf's Detroit engineers recommend the Fruehauf copy appear. Try as it might, Fruehauf's efforts, through the testimony of Mr. Pappas to refute the great mass of evidence, substantially all of it produced by Fruehauf, that the exterior appearance of the Cornhusker 800 is non-functional, fail.

This is not a patent case. This is a trademark and unfair competition case. This is the area of jurisprudence that must be examined and applied. With reference to legislation proscribing unfair competition, the *Sears* Court said:

> "Doubtless a State may, in appropriate circumstances require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the

> source, just as it may protect businesses in the use of their trademarks, labels or distinctive dress in the packaging of goods, so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods."

It is to remembered that the Supreme Court was discussing the power of a *state* to enact legislation.

The Lanham Act and related federal enactments are a constitutional exercise of the power granted to Congress by the Commerce Clause, Article I, Section 8, Clause 3.

The intent of Congress in enacting federal legislation relating to unfair competition and trademarks, both registered and unregistered, is clearly stated:

> "The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce, . . . to protect persons engaged in such commerce against unfair competition, . . ."

Title 15, U. S. C. A., Section 1127.

Mr. Justice Black, speaking for the Court in *Compco*, stated:

> "As we have said in Sears, while the federal patent laws prevent a state from prohibiting the copying and selling of unpatented articles, they do not stand in the way of state law, statutory or decisional, which requires those who make and sell copies to take precautions to identify their products as their own. A State of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceives the public by palming off their copies as the original."

Fruehauf has cited no authority, since none exists, for its theory that Congress cannot enact laws proscribing unfair competition and relating to the improper use

of trademarks in interstate commerce. The Lanham Act is constitutional. Its application by the Eighth Circuit Court was correct and should be affirmed.

IV.

The amount of recovery awarded TESCO for the trademark violation and unfair competition by Fruehauf.

Both the Trial Court and the Eighth Circuit Court awarded TESCO a portion of the profit received from the sale of the Hobbs copies of the Cornhusker 800. The Appellate Court granted TESCO all of Fruehauf's profits from sales in Nebraska, Iowa and Minnesota, the states wherein it determined TESCO had penet ed the market. (A-53)

Both the Trial Court (A-18) and the Eighth Circuit Court (A-48) reviewed in detail the decisions rendered by this Court and the various Circuits. The determination by the Eighth Circuit Court constitutes a proper application of the law.

After examining in detail the decisions rendered in the various Circuits, the Eighth Circuit Court stated:

> "A distinguished panel of the Second Circuit had occasion to consider the extent profits should be recovered in a case of this kind in *W. E. Bassett Company v. Revlon, Inc., supra.* There Revlon unilaterally determined that it could trade upon the goodwill of a competitor by coupling the latter's trademark with its own name and reputation in the manufacture and sale of a cutiele trimmer. Notwithstanding the fact that this infringement did not cause customer confusion, because the competitor was not manufacturing a similar product, and that Revlon's sales were not,

therefore, attributable to the unlawful conduct, an accounting of all of Revlon's profits was required because:

" 'It is essential to deter companies from willfully infringing a competitor's mark, and the only way the courts can fashion a strong enough deterrent is to see to it that a company found guilty of willful infringement shall lose *all* its profits from its use of the infringing mark.' (Citations omitted emphasis original.)

Id. at 664.

"While we do not read *Revlon* as authority for the proposition that all of the infringer's profits should be recovered in every case, we do find that result to be appropriate here.

"The District Court found that:

> In the present case the evidence shows that [Fruehauf] deliberately copied the distinctive design of [TESCO's] hopper bottomed trailer, and it cannot be said that the defendant believed that no likelihood of confusion as to the source of origin of the trailer would occur in the marketplace. [Fruehauf] chose to copy the most distinctively designed hopper trailer sold in the marketplace in an attempt to divert sales from other competitors who manufactured a less identifiable product. [Fruehauf] deliberately fed upon the identification factors which were intentionally designed into the Cornhusker 800 trailer by [TESCO's] president. Willfulness and bad faith are clearly shown by the evidence of this case.

"This finding is supported by the facts. Fruehauf, without knowledge of or inquiry into the functional and nonfunctional aspects of the exterior design of the Cornhusker 800, copied exactly not only the superior functional qualities of the TESCO trailer but also the exterior physical characteristics by which that

good reputation was known to the purchasing public. It not only sought and received the benefits of TESCO's goodwill, but, by coupling the latter's reputation with its own well-known name, set upon a source of conduct which, in practical effect, would destroy the good reputation of TESCO. The award of only twenty percent of Fruehauf's profits is clearly inadequate to ensure that similar conduct will not reoccur in the future.

"Moreover, given the bad faith conduct of Fruehauf and the potentially devastating effect that conduct had on its weaker competitor, TESCO, we are hesitant to limit the award on the basis of the fine-tuned results of a post-infringement market survey. The decision to purchase a product, while usually justified by the objective criteria of performance, is often predetermined by the subjective factor of the product's good reputation previously existent in the marketplace.

"Accordingly, the judgment and order of the District Court is affirmed except as to the recovery of profits. As to that, the cause is remanded for entry of judgment in that amount which will award TESCO all of Fruehauf's profits from sales of the trailers copied from the Cornhusker 800 and trade-ins taken as part of the purchase price in the sale of those trailers in Nebraska, Iowa and Minnesota during the period of infringement." (A-51)

V.

There are no special and important reasons for granting review.

As in the Eighth Circuit Court, Fruehauf here argues that it is privileged to copy TESCO's Cornhusker 800 so as to prevent a violation of the federal policy against the monopoly of *useful products.* Fruehauf attempts to con-

fuse the record concerning what is the *useful product*. It clearly *is not* the exterior appearance of the Cornhusker 800. The *useful product* is the twin hopper bottomed trailer. The Eighth Circuit Court's order in no way limits Fruehauf's right to manufacture and sell twin hopper bottomed trailers. Functionally, Fruehauf can market a precise copy of the Cornhusker 800. That fact alone should lay to rest the arguments of Fruehauf that the Court's decision is contrary to law.

The area of protection granted to TESCO is plainly limited to the nonfunctional exterior appearance of the Cornhusker 800, the trademark used exclusively by it to identify its unique, twin hopper bottomed trailer.

The Eighth Circuit Court made an exhaustive analysis of the decisions of this Court and those of the First, Second, Third, Sixth, Seventh, and Ninth Circuits. Its decision is not in conflict with any other reported case.

The Appellate Court stated:

> "Full and fair competition requires that those who invest time, money and energy into the development of goodwill and a favorable reputation be allowed to reap the advantages of their investment. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U. S. 470, 492, 493 (1974); 2 Callmann, Unfair Competition, Trademarks and Monopolies § 60.4 (b) at 516 (3rd Ed. 1968). As the legislative history of the Lanham Act states:
>
> "Trade-marks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trademarks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will be preventing their diversion from those who have created them to those who have not."

> "Senate Report No. 1333, 1946 U. S. Code Cong. Serv. 1275. To protect TESCO against the misappropriation of the exterior design of the Cornhusker 800, portions of which are nonfunctional and which is possessed of a secondary meaning, will be in furtherance of this Congressional purpose. *Potato Chip Institute v. General Mills, Inc.*, 333 F. Supp. 173, 179 (D. Neb. 1971), *aff'd per curiam*, 461 F. 2d 1088 (8th Cir. 1972); *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F. 2d 649 (3rd Cir. 1954). Contrary to the situation in *Sears* and *Compco*, there is in the instant controversy no conflict with federal statutory policy. Fruehauf's contention that it is privileged to copy the exterior design of the Cornhusker 800 must fail." (A-36)

Upon examination of the record, it is quickly seen why Fruehauf seeks to disavow all of the evidence from its engineers and officers concerning the nonfunctional exterior appearance by the last testimony proffered through Mr. Pappas at the April, 1975, trial.

There is not, nor can there be, any real dispute that the exterior appearance of TESCO's Cornhusker 800 is nonfunctional. Yet in its Petition to this Court, Fruehauf argues that the public's interest will be affected adversely if it cannot copy with impunity the nonfunctional exterior appearance of its competitor's product. An appearance which is used solely for identification.

Fruehauf is clearly an unfair and unlawful competitor. It acted in bad faith and intentionally. The Lanham

Act proscribes such conduct and provides the remedy as granted by the Eighth Circuit Court.

This is not a patent case, it is an unfair competition case. Both the Trial Court record and the law as announced by every Federal Court which has spoken on the subject matter supports the decision of the Eighth Circuit Court.

CONCLUSION

The decision of the Eighth Circuit Court is correct. There is no basis for granting Fruehauf's Petition for a Writ of Certiorari. The Petition should be denied.

August 9, 1976.

Respectfully submitted,

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